FAULT AND LIABILITY

Two Views of Legal Development

GLEANING in a field where Holmes, Ames, Wigmore, Thayer, and Smith have garnered is not a very promising enterprise. Such a field is the study of the development of the relation between tort liability and fault. We can venture, at least, to draw upon their stores of facts to serve us in connection with a new need — the difficulty of explaining the recent tendency to revert to liability without fault in certain cases. Incidentally we may reconcile the two apparently conflicting theories of legal development that these writers represent.[1]

Mr. Justice Holmes in "The Common Law" (1881) placed before us two possible bases of tort law, that of a man acting at his peril and that of liability confined to moral shortcoming. He rejected both theories in favor of a synthesis of his own: that liability is determined by what the law would consider blameworthy in an average man. The process by which the law arrives at this synthesis, according to him, is one in which

> "the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests of morals. But as the law has grown even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril."

In other words, according to Mr. Justice Holmes, the law begins with liability based on fault, and tends, as it grows, to formulate external standards which may subject an individual member of society to liability though there is no fault in him.

It may be well to understand at the outset that this view is dis-

[1] See Bibliographical Note at end of this paper.

tinctly opposed to the view of legal development generally found in the books today. The most elaborate presentation in English of the doctrine that primitive law has no concern with blameworthiness, is that of Dean Wigmore. "Primitive Germanic Law," he tells us,

"raised no issue as to the presence or absence of a design or intent; it did not even distinguish in its earlier phases between accidental and intentional injuries."

He then overwhelms us with German, Dutch, Italian, and French authorities to prove that

"the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance, the visible source, whatever it be — human or animal, witting or unwitting — of the evil result."

Among all primitive peoples, he tells us, "the doer of a deed was responsible because he was the doer." He finds no evidence and but few writers to throw doubt on his theory.

"It is true," he admits, "that B. W. Leist in his *Graeco-Italische Rechtsgeschichte*, 1884, insists that even in the most primitive Greek period a distinction was made between intentional and non-intentional harms, but in this he stands alone; though Freudenthal in Mommsen's *Zum ältesten Strafrecht* inclines to that view. However, Glotz has once for all demonstrated the matter."

In short, the current view, which in honor of its American expounder I shall call the Wigmore view, is that the law begins with making a man act at his peril and gradually becomes moralized until liability is connected with fault. The tendency, in other words, is exactly the opposite to that described by Justice Holmes.

The Wigmore View True of Modern English Law

If we confine our attention to the best known period of English Law, from the reign of King Edward I to that of Queen Victoria, it is not difficult to see why the Wigmore view has become the generally accepted one — though by no means all of its devotees are conscious of the thoroughness of their departure from the theory of "The Common Law."[2] A fine application of the current

[2] When Wigmore says (29 Harv. L. Rev. 607), "I admire supremely Justice Holmes' 'Law of Torts' because — he is the only writer who has (publicly) agreed with

view to this period of history is contained in Dean Ames' memorable address at the Seventy-Fifth Anniversary of the Cincinnati Law School. After telling us that "early law is formal and unmoral," he asks:

"Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases?"

A survey of the last six hundred years is followed by this conclusion:

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."

This view of legal history, esoteric and learned though it seems, has become one of the commonplaces of English and American books. Sir William Markby was one of the first to utter it in England, but he did so with some trepidation.[3] Among recent writers we find it boldly flaunted. William Searle Holdsworth speaks confidently of "the dominant concept of Anglo-Saxon law, the idea that a man acts at his peril."[4] Sir Frederick Pollock, beginning as a disciple of Mr. Justice Holmes, allowed the adverse theory to grow on him until he unconsciously became an apostate. In the first edition of his book on Torts (1887) he reproduced the Holmes' view faithfully, that in spite of all *dicta* to the contrary, the English law was not and never had been that a man acted at his peril.[5] He even added almost the very words of his American friend, that he knew of no trace of any such doctrine in Roman or Continental jurisprudence. In later editions he cautiously limited this remark to "modern Continental jurisprudence," and added a most significant sentence: "Such [the doctrine that a man acts

me as to the fundamentals of that subject!" he apparently has reference to his analysis of the subject, hardly to his treatment of the question, whether early law is or is not founded on the fault basis. See notes 8 and 9, *infra*.

[3] In his ELEMENTS OF LAW, 1871, he noted the absence of any general principle of torts (see page 95). After the appearance of THE COMMON LAW he thought Holmes's "process of specification" of rules from a general principle of blameworthiness, unlikely (*cf.* 5 ed., 344, § 710, note).

[4] 2 HISTORY OF ENGLISH LAW, 42, 203; 3 *ib.*, 299, 303–04.

[5] (1 ed.), 108.

at his peril] seems to have been the early Germanic law."[6] The same change of mind is reflected in his discussion of the moral basis of Trespass. Though he retains, through several editions, the statement based on "The Common Law" that "all positive law must presuppose a moral standard" the later editions add this inconsistent new matter:

"In a rude state of society the desire of vengeance is measured by the harm actually suffered and not by any consideration of the actor's intention; hence the archaic law of injuries is a law of absolute liability for the direct consequences of a man's acts, tempered only by partial exceptions in the hardest cases."

Still, Sir Frederick Pollock professes to cite Mr. Justice Holmes "on the whole of this matter," but oddly enough he now links Dean Wigmore with him.[7]

The dean of English law-writers is not alone in this mystifying, because unconscious, dissent. In fact, we frequently find Mr. Justice Holmes cited as an authority for such propositions as the following:

"Our law of Torts has been changed from one of absolute liability to one in which, for the most part, recovery is based on culpability."[8]

"It is a familiar historical fact that according to primitive legal conceptions in England, as in Rome and elsewhere, one was liable for all the consequences of his acts irrespective of the care with which the acts were performed."[9]

If we turn to the third and fourth pages of "The Common Law," we shall find all that the English language can do to repudiate responsibility for this notion. The learned author says:

"Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very

[6] *Cf.* Webb's American edition (1894), 163, citing HEUSLER, INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS, II, 263, and the Laws of Henry I, to which later editions add BRUNNER, FORSCHUNGEN, 487 *sqq.* In the last edition he is more emphatic: "Such was the early Germanic law" [10 ed., 145].

[7] *Ib.*, 145, note *h.*

[8] For this statement Chapters I–IV of THE COMMON LAW are cited with Wigmore's essay, by Professor Whittier, in 15 HARV. L. REV. 336.

[9] For this statement THE COMMON LAW is cited by Arthur A. Ballantine, in 29 HARV. L. REV. 711. Judge Smith's reference to Holmes in 30 *ib.*, 254, 255, is also unguarded in that the latter is made to appear of one mind with Ames, Kenney, and Whittier, that there has been a "change from the old law" of acting at one's peril to a modern rule of blameworthiness of some sort.

far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked."

Then after showing us how, in course of time liability for unintended harms emerges, he proceeds:

"It will be seen that this order of development is not quite consistent with an opinion which has been held that it was a characteristic of early law not to penetrate beyond the external visible fact, the *damnum corpore corpori datum.*"

He has no doubt read Maine, perhaps also Lea.[10] He recognizes

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[10] See MAINE, ANCIENT LAW, 380; LEA, SUPERSTITION AND FORCE (3 ed.), Chap. I. Even after reading and being favorably impressed by Brunner's essay on which Wigmore's discussion is based, Holmes repeats (3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 382) that "the torts dealt with by the early law were almost invariably wilful," citing THE COMMON LAW, 3, 4, 101–03, with only this reservation: "I do not mean as a matter of articulate theory, but as a natural result of the condition of things."

As to Brunner's essay: Though Wigmore modestly gives Brunner credit for the idea of early law developed in his article, he really gets the theory of the absence of intent in primitive law from Post and Westermarck, whom he also cites. For Brunner clearly interpreted the facts quite differently: *Wie jedes Strafrecht ist auch das germanische Strafrecht generell darauf angelegt, im Verbrechen den verbrecherischen Willen zu strafen und ferne steht ihm der Grundsatz, strafen zu wollen, wo es keinen Willen, keine Schuld sieht. Allein das jugendliche Recht begehrt den sichtbaren sinnlichen Ausdruck des verbrecherischen Willens und sieht ihn in dem schädlichen Erfolge der That.* [Page 488 (815).] He goes on to speak of the mechanical, formal manner of deducing the *mens rea* (never of ignoring it) by a logic which is blind to the circumstances of the individual case. At this point he introduces his examples from the Beowulf and from Norse mythology to illustrate what he calls the "*typische Behandlung des Willens*" as contrasted with an individual examination of the will or intent in each case. [*Cf.* page 499 (823).] This "*typische Behandlung des Willens*" is essentially the same phenomenon as Holmes' "process of specification of rules" and what I refer to later as a "rough classification of culpable acts." The different aspects result from approaching the law as "a limitation of wills" or a "rule of conduct" or a "means to an end." How consistently Brunner adheres to his view in his DEUTSCHE RECHTSGESCHICHTE is shown in the very passages quoted by Wigmore from that work in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 481, notes 2 and 3. Noticing that Brunner constantly speaks of the old Germanic law as "presuming" or "imputing" an unlawful intent, he attempts in note 3 to come to the latter's rescue, by suggesting, "that when the learned investigator in these passages speaks, *e. g.* of 'treating the unlawful intent as accompanying, etc.' he hardly means to attribute to a past age the sentiments peculiar to the present one. The primitive Germans did not 'presume' or 'impute' an unlawful intent; they simply did not think of the distinction at all." Brunner could hardly be thankful for this attempt to kill his theory with kindness. On page 498 (823) he shows most clearly that the Anglo-Saxons saw the difference between acts done *gewealdes* and those done *ungewealdes*. (How else could they have developed the very words?) Their inability to carry out an investigation in each case as to the

the clash, says he knows no satisfactory evidence for the view which he refuses to adopt and concludes:

"But whatever may have been the early law, the foregoing account shows the starting point of the system with which we have to deal. Our system of private liability for the consequences of a man's own acts, that is for his trespasses, started from the notion of actual intent and actual personal culpability."

A clearer dissenting opinion could hardly have been penned even by the author of "The Common Law." It is, however, difficult to escape the tyranny of popular ideas! Here is one that expects those under its sway to derive *lucus a non lucendo*. But that is not all; when contrary facts show their heads, an apology is demanded — from the facts. It will presently appear that there are some very contrary facts to be dealt with in early English law. That is, the Anglo-Saxon laws were not nearly so unmoral as the Wigmore theory would lead us to believe. No one has presented these facts more clearly than Mr. George E. Deiser in his recent article, "The Development of Principle in Trespass."[11] He sees clearly that

"the [Anglo-] Saxon law was not indifferent to the intention with which an act was done, nor to the element of malice if present."

Then after giving excellent illustrations of the "many provisions in the Saxon laws . . . that suggest tests of liability and some that border on negligence," he offers this sacrifice to propitiate the current theory:

"The tests of liability appear sporadically and not as part of any coherent legal consciousness. Yet, tests must have been applied. In the case of the spear the test appears in the law; if the butt is higher than the point, the penalty is so much; if the butt and the point are on the same level, there is no fault. Furthermore some tests must be applied to determine whether or not a man knows of vice in his beasts. But when this is said, all is said."

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presence or absence of blameworthiness led to the recognition of types of culpable conduct. The note inserted in 1894 (at page 490) shows that von Amira was unable to convince him that the history of liability for accidental homicide (with all its superstitious associations) had been independent of the moral fault notion. *Ich sehe darin nach wie vor nicht eine singuläre Ausnahme, sondern nur einen Fall der typischen Behandlung des Willens, wie sie sich auch bei anderen absichtslosen Missethaten geltend macht.*

[11] See Bibliographical Note.

He then traces the development of the action of Trespass and draws this conclusion as to the condition of the common-law action in 1285:

"There is no elemental fact or series of facts upon which redress is based. . . . The cases discuss wrongs, and not whether they are intentional or not. . . . There is no suggestion in any of the cases as yet of any approach to a legal standard of conduct. That is a product of a later day. The standard is purely objective. The law is made cognizant that a wrong has been committed — or since this is a prejudicial statement — becomes aware of an injury — it seeks the actor — the person actively contributing to the injury — it compels him to pay the sum ascertained as damages."

A clearer contrast between the basis of liability in Anglo-Saxon days, and the basis two centuries after the Conquest, could hardly be drawn. The fault element (indefinite and crude, to be sure) is stronger in the earlier period than in the later, but modern scholarship will not permit the facts to speak for themselves. A legal standard of conduct, it insists, is the product of a later day.

At this point, I dissent — at least from the *innuendo*. That fault and liability diverge as we go back to the Year Books is no proof that they must diverge more and more, back to the beginning of time; nor is it a safe indication that they will continue to converge from now on until the end of time. On the contrary, the segment of English history on which the observation is based has been preceded and is being followed today by tendencies in the opposite direction.

Let us first consider the present tendency to multiply instances of liability without fault. Much of the older liability without fault was unwittingly discarded when our codes of pleading swept aside such technical actions as Trespass and Trover, and left in their places the notion that one's petition must allege some actual wrong, a cause of action. Yet a few old stocks have remained and some of them have proved quite hearty: thus mistakes as to title are no excuse; in accident cases the doctrine of *res ipsa loquitur*, whether assisted by the rule in *Rylands* v. *Fletcher* or not, may lead to wonderful results; the vicarious liability of employers has survived (I am not saying from very ancient times[12]) not to drag out a mis-

[12] It is remarkable that when the two authors whose views are here contrasted come to this concrete illustration they seem to change sides. That is, Wigmore, who

erable existence, but to flourish as never before in the atmosphere of modern business organization, for the number of acts that must be left to servants and agents is increasing from day to day. The most marked instances of modern liability without fault are, of course, in the field of legislation. Statutes and ordinances raising a presumption of negligence, sometimes "conclusive" in law as well as in fact,[13] and statutes of "constructive" fraud are creeping into the books. It is hardly necessary to demonstrate here that some of these phrases are mere euphemisms for "liability without fault."[14] The liability of the owner of a dog is being placed by statute squarely on the ground of ownership independently of negligence even to a greater extent than it was in King Alfred's day (871–99).[15] As that famous lawgiver made liability for the wielding of a spear depend upon whether its point was carried three fingers higher than the butt,[16] so a modern legislature would make the liability of one who digs within the city limits depend not on the question of actual negligence, but on whether he goes deeper than nine feet.[17] Locomotives seem now to attract the legislative lightning that formerly was caught on the points of spears. We are not surprised to read in a modern General Code:

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teaches that early law knew no connection between blameworthiness and liability, finds a modern origin for the liability of a blameless principal. Holmes, on the other hand, who sees in liability without fault a later development, considers this particular illustration a senseless "survival from ancient times." 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 368, 533. *Cf.* also THOMAS BATY, VICARIOUS LIABILITY, 1916, maintaining the theory of a modern origin.

[13] Ezra Ripley Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

[14] Jeremiah Smith, "Surviving Fictions," 27 YALE L. J. 147, 155.

[15] ANCIENT LAWS AND INSTITUTES OF ENGLAND, Alfred, 23 (Th. 79; L. 62. In citing the Anglo-Saxon laws, I shall give in parentheses the page references to Thorpe's edition of 1840 [Th.], and to Volume I of Liebermann's edition of 1903–12 [L.]. Deviations from Thorpe in my translations are indicated by italics.) "If a dog *bite* or *kill* a man, for the first misdeed let vi. shillings be paid; if he [the owner] give him food; for the second time, xii. shillings; for the third, xxx. shillings. If after any of these misdeeds, the dog escape, let this 'bōt' nevertheless take place. If the dog do more misdeeds, and he keep him; let him make 'bōt' according to the full 'wēr,' *or* wound-'bōt' *according to the damage inflicted.*" (Of course, we must not forget that in early times human traits may naively have been imputed to the dog.) With this early law compare, *e. g.*, GENERAL CODE OF OHIO, 1910, § 5838: "A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place. . . . The owner or harborer of such dog shall be liable to a person damaged for the injury done."

[16] Alfred, 36 (Th. 85; L. 68).

[17] *Cf.* GENERAL CODE OF OHIO, 1910, §§ 3782, 3783.

"Every company operating a railroad . . . shall be liable for all loss or damage by fires originating upon the land belonging to it caused by operating such road. Such company further shall be liable for all loss or damage by fires originating on lands adjacent to its land, caused in whole or in part by sparks from an engine passing over such railroad.[18]

Employers' liability for injuries suffered by employees independently of the question of fault may perhaps be classified with contract cases rather than under the head of tort.[19] But Judge Smith has prophesied, in tones that suggest the foreboding of evil, the extension of some such plan of compulsory insurance to accident cases not involving employer and employee.[20] Mr. Justice Holmes, it will be remembered, had playfully suggested such a notion only to dismiss it.[21] Mr. Moorfield Storey more recently had held it up as a proposition worthy of more serious consideration[22] — and now comes Mr. Arthur A. Ballantine enthusiastically advocating it.[23] In the last paragraph that we have from the pen of the late Dean Thayer there is an expression of admiration for the manner in which Judge Smith has pointed out the apparent tendency in this field to recur to earlier conceptions, coupled with this prophetic declaration:

"This is a period of legislation, when it is alike inevitable and desirable that industry be subjected to detailed regulation of many kinds. . . . The imposition of liability without fault will be a constant characteristic of such legislation."[24]

Even if it is a little too early to understand this reversion from the tort law of 1900 to that of 1300 — and the explanations offered are by no means harmonious — a glance into the processes by which the older law came into being will probably be illuminating.

The Holmes View and Early English Law

It may seem bold to skip a generation and go back to "The Common Law" for light on early English legal history. When

[18] General Code of Ohio, 1910, § 8970. For similar provisions in other states, see Pound's edition of Ames and Smith, Cases on Torts, 499, note.

[19] I have so treated it in an essay on "The Standardizing of Contracts," 27 Yale L. J. 34.

[20] 30 Harv. L. Rev. 241, 319, 409.

[21] The Common Law, 96.

[22] The Reform of Legal Procedure, 1911, 81 *sqq.*

[23] "A Compensation Plan for Railway Accident Claims," 29 Harv. L. Rev. 705.

[24] *Ibid.*, 814.

Oliver Wendell Holmes wrote, Bratton's Note-Book lay undiscovered; Maitland had not yet opened up to us the storehouse of thirteenth-century law; the great "History" was undreamt of; Dr. Liebermann was just beginning to get interested in Anglo-Saxon laws and Twiss was still pouring confusion on the text of Bratton.[25] Yet I am emboldened to go back to "The Common Law," not only by reason of the deference with which it is still being quoted by all writers on the subject, even the unconscious dissenters, but for two other reasons. (1) Justice Holmes' theory seems clearly borne out by an independent investigation of the facts, made with all our new advantages. (2) His view is, after all, reconcilable with the current theory — in fact, is a necessary complement of it, irreconcilable as these views may appear at first sight.

In approaching the Anglo-Saxon dooms to see which theory fits, there is, of course, no danger nowadays of our regarding the imperfect law of early historic times "as a degeneration from some better pattern of justice which our remote ancestors were supposed to have followed in a simpler golden age." Yet it is a mistake to assume that any defect we may discover in the laws of a particular time must have been present to an even greater degree in all earlier times. Granting the unmoral nature of much that passes for law in the Year Books, does it follow that the law of the Anglo-Saxons was utterly devoid of any moral sense? Let us examine a few passages in the Winchester Code of King Cnut (1027–34), to detect if possible the relation between liability and fault in the jurisprudence of his day.

"§ 76. And I hold it right, though any one set his own spear at the door of another man's house, and he have an errand therein; or if any one quietly lay any other weapon, where they would be still if they might; and any man then seize the weapon and do any harm therewith; then it

[25] "When I began," wrote Holmes recently, in the introduction to the first volume of the CONTINENTAL LEGAL HISTORY SERIES, "the law presented itself as a rag-bag of details. The best approach that I found to general views on the historical side was the first volume of Spence's Equitable Jurisdiction, and on the practical, Walker's American Law." No wonder that Wigmore suggested the ignoring of all studies of Anglo-American legal history that appeared before THE COMMON LAW! (2 ST. LOUIS CONGRESS OF ARTS AND SCIENCE, 1904, 350). Yet I do not mean to speak disrespectfully of the men who produced this literature — at least not here, with the grand old portrait of Timothy Walker, the author of "American Law" and the founder of this school, staring down at me from over my desk as I write.

is right that he who wrought that harm, also make 'bōt' for the harm. And he who owns the weapon, let him clear himself, if he dare, [by swearing] that it never was either by his will, or in his control, or by his counsel, or with his cognizance: then it is God's law, that he be innocent; and let the other who wrought the deed, see that he make 'bōt' as the law may teach.

"§ 77. And if any man bring a stolen thing home to his cot, and he be detected [by the owner]; it is just that he [the owner] have what he went after. And unless it has been brought under his wife's key-lockers, let her be clear; for it is her duty to keep the keys of *the following:* namely her 'hord-ern,' and her chest, and her 'tege.' If it be brought under any of these, then is she guilty. And no wife may forbid her husband that he may not put into his cot what he will. It was ere this, that the child which lay in the cradle, though it had never tasted meat, was held by the covetous to be equally guilty as if it had discretion. But henceforth I most strenuously forbid it, and also very many things that are very hateful to God." [26]

Clearly what animated the great lawgiver who spoke in this code was an almost religious horror of liability without fault such as had crept into the dooms of some of his predecessors. And when he attributed this anomaly to the greed of the covetous, I am not sure that he was not a better historian than some of our modern scholars who would explain it by a doctrine of Original Sin.[27] But, it may be said, the Danish invader was far ahead of his times. Did the earlier Anglo-Saxon dooms deal with a man according to his fault? Hastening over the passages in Edward (901–25) [28] and Ethelred (980–1016) [29] — these may have been borrowed directly from the Church — let us go back to King Alfred (891–901), who distinguished, crudely to be sure, between damage done by a spear properly carried and that done by one improperly carried. He had also distinguished in respect to the measure of damages between the owner's liability for the first, second, and third "mis-

[26] Embodied also in Henry I, 87, 2 (Th. 419, 593; L. [§§ 75, 76] 362, 601).

[27] Cnut's principle had been expressed in the seventh century. Ine, 7 and 57 (Th. 107, 139; L. 92, 114).

[28] Edward the Elder, I. 1 (Th. 161; L. 141): ". . . he should then declare on oath that he did it not 'from any knavery, but with full right, without fraud and guile' . . ."

[29] Ethelred, 52, embodied in Cnut, II, 69 (Th. 329, 413; L. [§ 68] 258, 354): "And if it be that anyone unwillingly or unintentionally do anything amiss he shall not be like to him who misdoes intentionally and of his own will; and also he who is an involuntary doer of that which he misdoes, he is ever worthy of protection and of the better doom because he was an involuntary doer of that which he did."

deeds" of a dog. The *scienter* idea, vaguely foreshadowed here, is also suggested in what he copies from his kinsman, Ine (688-95), with reference to swine that make a habit of helping themselves to unallowed mast and to beasts that break hedges and go in everywhere.[30] We are at once reminded of the Biblical case of the vicious ox which King Alfred translates from Exodus: "*Or if it be known that the ox was wont to gore in time past, and its owner hath not kept it in, he shall surely pay ox for ox, and the dead beast shall be his own.*" [31] But, it may be said, King Alfred, too, was a reformer. Does he not tell us that he rejected those dooms of his forefathers which did not seem good to him? Let us consider, then, the oldest words of law that have come down to us in a Germanic tongue, the Laws of King Ethelbert (about the year 600), and ask here whether the measure of damages is based on a theory of fault or purely on the doctrine of compensation for damage inflicted by acts done at one's peril. God's property and the Church's must be paid for twelvefold, the Bishop's elevenfold, and so on down through a scale measured not by the loss of the complainant nor even by a "probable rise and fall in his passions," but by the seriousness of the fault of the defendant.[32] True, it is suggested in the Anglo-Saxon dooms that the owner of weapons is *prima facie* liable for harm inflicted with them though he have no part in their use; but in such cases he could always clear himself by oath, that is, he had the burden, or rather the privilege of proof.[33] On the other hand,

> "if a man furnish weapons to another where there is strife though no evil be done, let him make 'bōt' with vi. shillings." [34]

The intent may be even more important than the infliction of harm. If, then, without attempting to go back to those ultimate beginnings that may properly be called primitive, we stop at the dawn of English legal history we find the fault basis clearly assumed. Indeed, if we read the mediæval dooms through, instead of stopping

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[30] Ine, 42, 49 (Th. 129, 133; L. 106, 110).

[31] Exodus xxi. 35, 36 (Th. 51; L. 34).

[32] Ethelbert, 1 (Th. 3; L. 3).

[33] See LIEBERMANN, GESETZE, II, *Glossar, s. v. Gefährdeeid;* Alfred, 19, embodied in Instituta Cnuti, III, 40, and Henry I, 87, 1 (Th. 75, 593; L. 60, 601, 613); Cnut, II, 75, 76, embodied in Henry I, 87, 2–3 (Th. 419, 593; L. 362, 601).

[34] Ethelbert, 18 (Th. 7; L. 4); *cf.* also Hlothhere and Eadric, 13 (Th. 33; L. 11).

at curious phrases, we shall find that the most striking principle that runs through them is a rough adjustment of liability to fault.[35]

In suggesting that mediæval law is not free from the fault notion, I am not asserting that the mediæval mind held it as a separate concept analyzed away from many related and even unrelated concepts. The isolation of such ideas may be as modern as the isolation of disease germs. But their power was as real in the past and as well attested as that of the epidemics that used to be attributed to the acts of God, or more probably to the acts of the Devil. The primitive reaction to offense is undoubtedly a very tangled mass. To overemphasize the fault element in it may be misleading, but it is equally misleading to isolate the revenge element (in a limited technical sense), or the taboo element, and more so to deny the existence of any one of them as an active force. In fact, the very idea of a separation of law from religion or morals in early times is an anachronism. "Thou shalt not kill," is law (criminal and civil), morals, religion, rolled into one, or rather one of the concrete rules of life from which these abstractions are destined to be evolved. The embryonic law of primitive man is not unmoral in any modern sense.

How the Theories Supplement Each Other

It seems then that the history of tort law records lapses from the moral fault basis and returns to it, rather than a single movement in any one direction. There is, in fact, an alternation between periods of the tendency that Justice Holmes described when cases of acting at one's peril multiply in the law and periods of the kind Professors Ames and Wigmore describe, when morals are reinfused into the law. This alternation is entirely consistent with what we know of other branches of the law. Thus I have traced elsewhere a parallel phenomenon in the history of contracts, showing that legal development veers from standardization to individualization

[35] Surely Liebermann is entitled to the last word on the subject with reference to the laws of the Anglo-Saxons. After discussing all of the instances of liability without fault that have ever been pointed out, he says, *s. v. Absicht: Dass aber die Unterscheidung der Absicht uralt-menschlich sei, scheint mir wahrscheinlich dadurch, dass sie den höheren Haustieren nach längerer Bekanntschaft mit dem Menschen zu eignen pflegt.* After all, we come back to Holmes and his pet dog.

of contractual relations and back again.[36] The former condition (to which we might give the name "status") predominates in periods of strict law (such as accompany and follow periods of codification); the latter in the intervening periods of growth by Equity. In like manner it is now submitted that the completest coincidence of individual fault and liability occurs in periods when legal development is by means of Equity, and that *jus strictum* brings with it a standardization of types of culpable conduct. A similar explanation is implied in "The Common Law," though a different view is taken there of the relative size and importance of the component parts of the movement, and the frequency and eccentricity rather than the regularity and naturalness of one of them is stressed. After discussing the possibility of disposing of the rule of acting at one's peril on the basis of precedent, of theory and of policy, Justice Holmes says:

"But we may go further with profit, and inquire whether there are not strong grounds for thinking that the common law has never known such a rule, unless in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction." [37]

It remains for us to consider the tendency of this type of period to recur regularly and to bring with it the condition that Justice Holmes regards as exceptional. Incidentally we shall find that what he calls the exception is so far-reaching in its effects that it is not surprising that others have seen in it the rule. For the purposes of our present synthesis we may call the two movements — both that to and that from the fault basis — swings of a pendulum rather than rule and exception.

As we found in our study of contracts, the periods of the culmination of strict law in English legal history have been three:

First: The crystallization of old English customs about the time of the Norman Conquest (eleventh century).

Second: The period following the closing of the Register of Writs in the days of Edward I (early fourteenth century).

Third: The period into which we are now passing.

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[36] 27 YALE L. J. 34. I have discussed other phases of the tendency of legal stages to recur in cycles, in 65 U. OF PA. L. REV. 665, and in 31 Harv. L. Rev. 373.

[37] THE COMMON LAW, 89.

The intervening periods, as we shall see, are filled with a struggle to moralize the tough law with which they have to grapple by bringing liability and fault together.

Jus Strictum and its Types of Culpable Conduct

It is of the unmorality of the first of the historic periods of strict law enumerated and the relics of an older prehistoric period that Dean Wigmore's authorities speak. Ames fixed his attention on the unmorality of the second period. It is the coming of the third period that looms large to Judge Smith. All of these periods have one characteristic in common: they seem to set certainty above justice.[38]

It is significant, however, that at least those of the periods that fall within historic times are not really unmoral. We do not have to look far in any of them for traces of a feeling that normally liability should be based on fault. The difference is one of degree — the degree to which the peculiarities of an individual case can be taken into consideration. The first of the historic periods of strict law, that of the Conquest, looks back to old Anglo-Saxon maxims and forms for its guidance, not approvingly, but somewhat helplessly.[39] The man who cannot swear that he has not brought another nearer to death and further from life is indeed unfortunate, according to the so-called laws of King Henry I (1114–18). Yet the compiler is not blind to the anomaly of such rules. Accordingly he brings them all together in one place.

"There are moreover many kinds of misfortunes (*infortuniorum*) happening by accident (*casu*) rather than by design (*consilio*) and to be handed over to mercy rather than to judgment; for the law provides who unwittingly offends, shall wittingly make amends, and who *brecht ungewealdes bete gewealdes*. . . . In these and similar cases where a man

[38] We are reminded of F. R. Coudert's Certainty and Justice, 1913. In his opening paragraphs he suggests that in the "general conflict between certainty in the law and concrete justice in its application to particular cases . . . the pendulum swings first one way and then the other." He does not seem to have in mind, however, the big swings of the pendulum in the course of history, to which these words might aptly apply, but only minor vibrations caused by the presence of two inconsistent ideals in the mind of a court. His discussion comes down to this: "The truth is that the courts are oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards on the other." *Cf.* Pound, "Justice According to Law," 13 Col. L. Rev. 696, 699.

[39] *Cf.* Edward the Confessor, 12 (Th. 447; L. 638); *ib.*, 23 (Th. 452; L. 648).

intends one thing and another happens, where the *deed* is accused and not the *will*, let the judgment-makers decree rather venial damages (*emendationem et honorificenciam*) according to the circumstances."[40]

And this same code quotes from the Church Fathers, "*Reum non facit nisi mens rea.*"[41] In this code there is also a provision regarding the man who slays in self-defense.[42] It looks like an attempt to distinguish his case from that of the murderer on the basis of a fiction that the victim has rushed upon his enemy's extended spear. The age is not above fictions. Unable to get away from the tradition that he who falls from a tree and kills another is liable, it proceeds after the manner of Portia to say that the avenger may if he chooses fall from the same tree on the slayer.[43] This is a virtual declaration that the accidental slayer is neither civilly nor criminally liable. But above all we must never forget in dealing with this period that the *judicium dei* was expected in the final analysis to take care of exceptional cases and to separate the innocent from the guilty.

In the second period of *jus strictum*, that of the early Year Books, a good illustration of liability without fault is found in the recognition of the old custom of holding a man responsible for his fire, regardless of the question of negligence. The gist of the action, though frequently misunderstood, is now generally conceded to have been the failing to guard one's fire. The case of *Beaulieu* v. *Finglam*[44] has frequently been cited to show that five hundred years ago the notion of culpability as the basis of liability had not taken firm root in the law. The report of the case shows the contrary to be true. The attorney for the defendant seemed to assume the general principle of culpability, and the court did not object to his major premise.

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[40] Henry I, 90, 11 (Th. 600; L. 606); *cf. ib.*, 88, 6 (Th. 595; L. 603). For a mediæval French passage of the same tenor, see BEAUMANOIR, COUT. DU BEAUVOISIES, 69, quoted by Brunner, 494 (819).

[41] Henry I, 5, 28 (Th. 511; L. 551), quoted from Augustine, SERMO, 180, 2. This is found in the almost contemporaneous *Decretum* of Ivo (xii, 39) and is later embodied in Gratian, CANON 22, *quaestio* 2, *causa* 3. Similar sentiments are expressed in Henry I, 34, 1; 35, 2; 68, 7, 9; 70, 12; 72, 2; 75, 5; 86, 2, 3 (Th. 536 *sqq.*; L. 565 *sqq.*).

[42] Henry I, 88, 4 (Th. 595; L. 602).

[43] *Ib.*, 90, 7 (Th. 600; L. 606).

[44] Y. B. 2 Henry IV, 18, pl. 6, translated by Holmes in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 383.

"HULL, for the defendant: That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feasance. . . .

THIRNING, C. J.: If a man kills a man by misfortune he will forfeit his goods, and he must have his charter of pardon *de grace. Ad quod curia concordat.*

MARKHAM, J.: I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any of them does, such a thing, as with a candle or other thing, by which feasance the house of my neighbor is burned; but if a man from outside my house against my will, puts the fire . . . for that I shall not be held to answer to them, *etc.*, for this cannot be said to be through ill-doing (*male*) on my part, but against my will."

The learned judge's application of his principle to the facts of the case is no doubt a little rough, a little mechanical. In fact the Chief Justice thinks it better that the defendant be wholly undone than that the law be changed through their sympathy for him. Yet the idea that ill-doing (*male*) and liability are somehow connected is by no means repudiated.

For the modern period we need not look far for evidence that our new cases of liability without fault are not based on the absence of an ethical theory of law. The self-consciousness of our age is developing a whole apologetic literature on cases of liability without fault even before the period of statutory formulation has run its course. I do not propose to justify the statute which takes away the "one bite" that the common law accorded every dog, or to enter into the philosophy of the nine-foot excavation rule, or the business sense of constructive fraud, or a nice comparison of the social values involved in the taxing of the nearest rich man to relieve the misfortunes of a poor neighbor, I merely suggest that in each of these periods of strict law we are encountering the same difficulty that eternally confronts the lawmaker. In his zeal to state what usually constitutes culpable conduct and in his distrust of tribunals, especially in cases where the damage is more easily proved than the fault itself, he makes probability take the place of proof, though by reason of his generalization the innocent must suffer with the guilty. As Pollock and Maitland have expressed it, with reference to the exceptional cases in early English law — they are after all exceptional —

"the extreme difficulty of getting any proof of intention, or of its absence, in archaic procedure is perhaps the best explanation of rules of this kind."[45]

But when we come to more mature systems with better procedural machinery the same difficulty confronts us. "Exceptional cases," says Sir Frederick Pollock in speaking of modern common law,

"do occur, and may be of real hardship. One can only say that they are thought too exceptional to count in determining the general rule of law. From this point of view we can accept, though we may not actively approve, the inclusion of the morally innocent with the morally guilty trespasser in legal classification."

Again

"The principle of certainty requires that a rule once settled shall be carried out to its consequences when no distinct cause is shown for making an exception or revising the rule itself."[46]

One might imagine that the statute law of the twentieth century could avoid all roughness in classification. But when we turn to our modern statutes with reference to peculiarly hazardous enterprises we find that they redound to the benefit of men not exposed to the extra hazard. Of these Justice Van Devanter has said, that the doctrine of

"equal protection of the laws [does not] condemn exertions of [the power of Congress to classify] merely because they occasion some inequalities. On the contrary it admits of the exercise of a wide discretion in classifying according to general, rather then minute distinctions, and condemns what is done only when it is without any reasonable basis and therefore is purely arbitrary."[47]

In fact, legislation cannot escape more or less of rough classification and consequent inequalities.

EQUITY AND INDIVIDUAL FAULT

Still it is not to be expected that after these inequalities begin to be felt in concrete cases they will remain forever. The process of reintroducing the fault basis, so ably demonstrated by Ames in

[45] 1 HISTORY, 32, 55, (2 ed.), *cf*; Miss Bateson's Introduction to BOROUGH CUSTOMS, II (Selden Society, xxi), xl: "Ancient law could not discuss the question of intent because it had not the machinery wherewith to accomplish inquiry."

[46] TORTS (1 ed.), 16; FIRST BOOK OF JURISPRUDENCE, 52.

[47] Second Employers' Liability Cases, 223 U. S. 1, 52 (1911).

the lecture already cited, takes place not once but many times in the history of a legal system. Generations of interpretation may be necessary to rub off the edges of the legal polygon till it approximates the dimensions of the ethical circle, but the circle cannot be squared. This process of the infusion of moral ideas into the law has taken place in each of the intervening eras between the periods of strict law. Even back of the Norman Conquest, we have found a distinct consciousness of the impropriety of the dissociation of fault from liability in the law. Between the Norman crystallization of law and the Year Books there is another period of growth by Equity. Though Pollock and Maitland have laid all the facts about this period before us, there is a tendency of law writers to persist in classifying the age of Bratton as an age of strict law. The very opposite is the truth. It is during this period that the royal law is being bent into such shape that remedies are made to fit wrongs. It is impossible to understand the spirit of Bratton or of Raleigh and Pateshull, the great judges immortalized in the Note-Book, unless we recognize the equity of their period. "The crime or punishment of a father inflicts no stain on the son," says Bratton.[48] It must be borne in mind that the evolution by which tort and crime are differentiated from the parent species of "wrongs" is just being completed.[49] Turning again to Bratton we read,

"The crime of homicide [does] not receive the same punishment regardless of whether it be accidental or wilful for in the one case there is rigor, in the other, mercy." [50]

It is no longer possible to dismiss all such passages as copied from Roman law. The Romanism of Bratton was at least eclectic, and quite under the control of his English training. It is this age that invents the process of pardoning, as a matter of course, for accidental killing[51] and killing in self-defense.[52] In this age the master

[48] DE LEGIBUS, f. 105.

[49] When the differentiation was complete the intent element was perhaps more vital in criminal law than in civil, but never absolutely dominant or entirely absent in either branch.

[50] DE LEGIBUS, f. 104*b*; 141*b*; *cf.* also 120*b*, 136*b*.

[51] SELECT PLEAS OF THE CROWN, I (Selden Society, i), Nos. 114 (1214), 188 (1225); BR. NOTE-BOOK, No. 1137 (1235–36); Statute of Gloucester, 6 Ed. I (1278), c. 9; FLETA, I, 23, 15.

[52] SELECT PLEAS OF THE CROWN, I (Selden Society, i), Nos. 70 (1203), 145 (1221); BR. NOTE-BOOK, Nos. 1084 (1225), 1216 (1236–37).

was permitted to show as to the wrongs of his servant *se in hoc non conscium esse.*[53] In fact, it is difficult to see how we can accuse the age that substituted trial by jury for the diabolical guess-work of the ordeal,[54] the age that abolished the vicarious liability of fellow townsmen,[55] the age in which the King's courts built up a whole system of law basing their very jurisdiction on breaches of the peace, and substituted personal for real actions in half our law,[56] of a failure to understand the connection between fault and liability. The technical arbitrariness that Ames found in the fourteenth century of whose law he was the master, and which he left us to assume must have been worse a century earlier, was really not nearly so bad in the thirteenth century, for whose law we must turn to Maitland.

When we pass into the long modern period of Equity, by which the law, up to the end of the last century, was gradually being moralized both within and outside of the Chancellor's court, we are on more familiar ground. The writers already cited have traced the steps by which the common law has progressed in its efforts to distinguish between the morally blameless and the morally guilty. For the former it has devised many defenses. To hold the latter it has taken cognizance of defamation, malicious prosecutions, actions for deceit, the protection of authors' rights, protection of one's contractual and social relations against interference from without, unfair competition, new varieties of nuisance and negligence. These writers have shown us how Equity has followed the law with its bills for restitution in the realm of tort as well as its bill for specific performance in the realm of contract; and, of course, in chancery it is not enough to show that your case falls within a class—the Chancellor to exercise his discretion intelligently must examine the defendant's conscience. It will be observed that the individualization has two aspects: it protects the innocent by breaking down the recognized types of culpable conduct, and it catches the guilty by making inroads upon the corresponding

[53] 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 497–502; SELECT PLEAS IN MANORIAL . . . COURTS, I (Selden Society, ii), 149, 153, 154 (1275); BR. NOTE-BOOK, Nos. 779, 781 (1233); DE LEGIBUS, f. 171, 172*b*, 204*b*, 158*b*.

[54] MAITLAND, PLEAS OF THE CROWN OF THE COUNTY OF GLOUCESTER, Introduction xxxvi, *sqq.*

[55] Statute of Westminster I, 3 Ed. I (1275), St. I. c. 23.

[56] JENKS, SHORT HISTORY OF ENGLISH LAW, 55–60.

recognized types of nonculpable (immune) conduct. It is this second phase of the process of individualization of liability cases that has brought about the question, "how far an act may be a tort because of the wrongful motive of the actor."[57] The revolt against the *typische Behandlung des Willens*, it is submitted, has furnished the true impetus to the development of the law of malice as well as the law of negligence, but by the irony of fate, malice and negligence themselves tend to become externalized and standardized, until the jurist must explain that malice and negligence in law are not the same malice and negligence in fact.

The Relation between Absolute Liability and Tort

The opening of the twentieth century found us with a well-developed theory of tort law, in which fault was an important, if not the all-important, element. At the same time cases of absolute liability were accumulating. What was to be done with them? Judge Smith, fearing that legislative activity in this direction might contaminate our newly rationalized concept of a "tort," would, I believe, rigidly exclude from the denotation of the term all cases not based on fault.[58] Dean Wigmore, inclining in the opposite direction, would abandon the word "tort" altogether.[59] "Names enough," he tells us, "could be found." But with new names, or with old ones, I find it impossible to fence off a field of law in which liability is based exclusively on fault. In the first place, even in those cases in which fault is admittedly the basis of liability, it is not the individual fault of the particular culprit, but rather a type of culpable conduct that must be considered. Take for example the case of negligence. Judge Smith has observed a difficulty here, and I submit with deference that he has not met it. "The Courts," says he,

> "have established an arbitrary standard of care, an external standard, *viz.*, the care which would be exercised under the circumstances by an average reasonable man, a man of average prudence,"

declining to take the individual's "personal equation into ac-

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[57] *Cf.* Ames' essay in 18 Harv. L. Rev. 411, reprinted in Lectures on Legal History, 399.

[58] 30 Harv. L. Rev. 241, 319, 409.

[59] 1 Wigmore, Select Cases on Torts, 1911, Preface, viii, quoted by Smith.

count."[60] It may seem a bit irreverent to call the "average reasonable man" or the "ordinary prudent man" a humbug, but he is at least a fiction "designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard."[61] "The rule," says Justice Holmes, "that the law does in general determine liability by blameworthiness is subject to the limitation that minute differences of character are not allowed for."[62] Now it would be impractical to put my case in one class — that of torts — if my personal equation happened to be like that of the average man, and in another, if my personal equation happened to be so different that the law held me liable though morally blameless. In other words, even within the realm of fault cases, the law cannot stop to take into consideration all of the peculiarities of the individual case to determine whether there is actual fault. It must classify, and classify more or less roughly.

On the other hand, most of the cases of recognized absolute liability have not been arrived at independently of any idea of conduct. It is not that in the one case liability arises though there is no corresponding primary duty breached, while in the other case there is a duty imposed in the first place. No, even in the case of the so-called absolute liability, the rule of law can be so phrased as to show a rule of conduct in which the duty imposed by law and the correlated right are clearly brought out. There is no need of going back to Austin's analysis and connecting absolute liability with "remote inadvertence;" I shall borrow at this point a part of the more modern apparatus of Professor Wesley Hohfeld,[63] and take the case of the statutory dog-bite (whether Anglo-Saxon or modern) as an example. Here a right is given to (or recognized in) each of us, a common (or general) right, not to be bitten by dogs. It is a "multital" right primarily against all dog-owners. What is the correlated duty? It is the duty of every dog-owner to prevent his dog from molesting us, at all hazards, that is, it is a

[60] Smith in 30 HARV. L. REV. 261, 262. To meet this difficulty in his attempt to separate "tort" from "absolute liability" he simply says: "We think it best that *all* cases of liability for negligence, in the legal sense, should be classed under tort, with the accompanying explanation that, in a few exceptional cases placed under this head, liability is imposed in the absence of personal fault."

[61] Thayer in 27 HARV. L. REV. 317.

[62] THE COMMON LAW, 108, cited by Smith.

[63] See 26 YALE L. J. 710.

positive duty imposed by law regardless of the fact that its performance may in a particular case be extremely difficult or even impossible. Just as we can assume duties by contract so that impossibility of performance will be no excuse, just so the law may (though for obvious reasons it generally does not) impose positive duties of a similar scope in the absence of contract. How, then, does the dog-owner's relation to the potential victim under the statute differ from such a relation at common law? Is it different in kind? Or is it the same kind of relation with an additional duty? For example, if my dog is set upon you by a third person, am I still liable under the statute? If in spite of the statute you sue me for damage inflicted by my dog alleging *scienter*, must you prove it, on the theory that the statutory right of action is an entirely different thing from the common-law right? Indeed, under the statutory action may *scienter* be proven to enhance damages, or is evidence of previous vicious acts irrelevant? What if the statute is repealed while the case is pending? Most of these questions are being answered on the supposition that the statutory relations between dog-owners and the community differ from those prescribed by the common law, not in kind, but in scope.[64] The statute (for reasons which we need not discuss) refuses to recognize as a limit to the duties imposed the point where impossibility or virtual impossibility of performance is reached. Again, whatever the reason, we have a case of rough classification as a result of which the innocent must suffer with the guilty.

Perhaps a digression may be in order here, to distinguish between a rough classification on one side, and a purely artificial, fictitious classification, or a grouping not in the name of classification at all, on the other. It may be said, for example, that where public policy shifts a loss from him on whom it falls originally, to another who is equally blameless, it may do so without imputing any fault to any one; and that even if we go through the phraseology of imputing such fault we are resorting to an empty fiction. Fictions, we are warned, obscure classification.[65] A conclusive presumption is said

[64] *Cf.* WILLIAM NEWBY ROBSON, THE PRINCIPLES OF LEGAL LIABILITY FOR TRESPASSES AND INJURIES BY ANIMALS, 117 *sqq.* For American cases see CORPUS JURIS, *s. v.* Animals, §§ 334, 349, 356.

[65] See Smith in 27 YALE L. J. 147, 155–56, amplifying 30 HARV. L. REV. 329, note 39.

to be "a rule of substantive law masquerading as a rule of evidence."[66] There may, indeed, be cases of liability without fault that do not grow out of resemblance to cases of culpability. Some of these are more closely allied to contract than to tort, as where the law says you cannot enter into certain relations without the assumption of certain absolute obligations or risks.[67] A few, like the primary obligation to support children or parents, are neither tort nor contract, and still others may be in the nature of a tax. How far our constitutions, to say nothing of public policy, will permit us to go in depriving Peter to pay Paul is still an open question.[68] But it is submitted that most of the examples which have ever been treated with tort law are related to classes of fault cases and grow out of an effort to induce people to be extraordinarily careful. One should watch his arms, his fires, his dogs, his digging, and be most careful to examine the title to property before he undertakes to meddle with it.[69] Liability without fault in such matters results from a failure of the law to provide for such exceptional cases as accident, unavoidable mistake, and self-defense. How, then, can we separate all absolute liability cases from those tort cases which are based on culpability?

THE PATH OF PROGRESS

Alternately approaching and receding from the culpability theory, we have traveled in a cycle, but our second path has been described

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[66] Williston in 24 HARV. L. REV. 425, quoted by Smith.

[67] *Cf.* note 19, *supra.*

[68] In City *v.* Sturges, 222 U. S. 313, 322 (1911), Lurton, J., makes the question of the "legislative power to impose liability regardless of fault" in the face of "a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against" turn on the police power. There is, of course, a much broader historical basis, which will have to be understood by our courts if they are going to decide the constitutional questions that are bound to arise out of our statutes of absolute liability, intelligently.

[69] As to the last of these duties, it has, indeed, been suggested that owing to peculiar historical conditions "the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries where the right was assumed not to be in dispute, became quite obliterated" and that in this way there has been dragged into tort law a class of property cases which originally had nothing to do with the question of blameworthiness [POLLOCK, TORTS (1 ed.), 14]. Be that as it may, the notion that there is no petitory or real action to recover chattels is as old as Bracton (f. 102 *b*) and the habit of approaching restitution cases from the tort angle antedates the beginning of legal memory.

by a much larger radius than our first. Our progress has been marked in two ways — by the higher moral notions to which we seek to adapt our law, and by a greater ability to adapt the law to any given moral notion. The improvement of our moral notions is reflected in our attempts to soothe our consciences whenever we find our law lapsing from its moral basis. A new problem faces us and we instinctively feel that a rough solution now is better than a deferred solution in which the ethics of the individual case will be more nicely measured. Yet we frankly criticize these temporary expedients even while we use them. Those of us who seek to justify them at all, refer to "public policy" or "social justice," or try to demonstrate that in the long run, or in the average case, the burden we impose on a man or on an "enterprise" for the benefit of society will be shifted to society.[70] But nobody preaches that a low morality is essential or desirable in law.

Finally, when we compare our facilities for importing moral considerations into the law with the crude provisions of the Middle Ages, we realize why our attempts at the classification of conduct must be more successful than those of the past — though our problems are more difficult and our ethical demands more complex. Yet in the course of progress we cannot wholly avoid rough classifications of conduct; and the extent to which our law suffers from them shows both upward and downward movements from time to time, being greatest in periods of strict law and least offensive to ethics in periods of Equity. We are now approaching a point where a re-defining of external standards seems necessary. If the moral notion that links fault with liability must to some extent be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free. The problems are new, but the limitations are the same, whether we declare them in the mediæval language of Chief Justice Brian — "The thought of man shall not be tried, for the Devil himself knoweth not the thought of man"[71] — or in the language of modern jurisprudence, that the law sets

[70] *Cf.* Roscoe Pound in 27 HARV. L. REV. 233: "There is a strong and growing tendency where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault."

[71] Y. B. 7 Ed. IV, 2, pl. 2.

up a standard of conduct that is constantly approaching the goal of ethics, a goal for which it must ever strive, but which it can never reach.

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